

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

ORIGINAL

In re)
)
 N.E. COLORADO CELLULAR, INC.)
)
 Petition for Waiver of FCC Rule)
 Sections 54.313 and 54.314)

CC Docket 96-45**RECEIVED****FEB - 8 2002**

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

To: Chief, Policy and Accounting Division
 Common Carrier Bureau

PETITION FOR WAIVER - EXPEDITED ACTION REQUESTED

N.E. Colorado Cellular, Inc. ("NECC"), by counsel and pursuant to Section 1.925 of the Commission's Rules, 47 C.F.R. §1.925, hereby requests a waiver of Sections 54.313 and 54.314 of the Commission's Rules, 47 C.F.R. §54.313, §54.314.¹ NECC requests that the Commission accept NECC's annual certification for high-cost universal service support to allow NECC to receive universal service funding as of February 6, 2002, the date upon which its high-cost certification was filed with the FCC and the Universal Service Administrative Company ("USAC").

I. Background

NECC is an FCC-licensed commercial mobile radio service ("CMRS") provider offering wireless telecommunications services in the Colorado 2, Colorado 5, and Colorado 8 Rural Service Areas ("RSAs"). On June 8, 2000, NECC filed an application with the Colorado Public Utilities Commission ("CPUC") seeking Eligible Telecommunications Carrier ("ETC") status in its service area in Colorado. On December 21, 2001, the CPUC issued an

¹ A fee is not required to be submitted with this request.

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Order designating NECC as an ETC in the non-rural service area of Qwest Communications and in those rural service areas served by NECC in their entirety.² Pursuant to Sections 54.313(b) and 54.314(b) of the Commission's rules, NECC filed its high-cost certification with USAC and the FCC on February 6, 2002.³

Under FCC Rule Section 54.313, a state that desires local exchange carriers and competitive ETCs serving non-rural areas to receive federal universal service support must file an annual certification with the FCC. Under FCC Rule Section 54.314, states must file similar certifications for local exchange carriers and competitive ETCs serving rural areas. Sections 54.313 and 54.314 also provide that an ETC not subject to the jurisdiction of a state that desires to receive support under the high cost program must file an annual certification with USAC and the Commission stating that all federal high-cost support will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.⁴ The CPUC advised NECC to self-certify pursuant to 47 C.F.R. §54.313(b), §54.314(b) because the State does not generally exercise jurisdiction over wireless carriers such as NECC. NECC filed its self-certification on February 6, 2002.

In order to be eligible to receive support for the full calendar year 2002 under Section 54.313 and the Commission's recently adopted Section 54.314, a carrier must have a

² See Recommended Decision of Administrative Law Judge William J. Fritzell Approving Stipulation and Settlement Agreement, Docket No. 00A-315T, Docket No. 00A-491T, Decision No. R01-1298, December 21, 2001 ("December ETC Decision").

³ See Attachment 1.

⁴ 47 C.F.R. §54.313(b), §54.314(b).

certification on file by October 1, 2001.⁵ The Commission's certification rules fail to provide a supplemental certification mechanism for carriers that are granted ETC designation after October 1, 2001. Moreover, in order to obtain funding for the second, third and fourth quarters of 2002, NECC must have a certification on file by January 1, 2002.

Under Section 54.314, a newly designated carrier such as NECC could face a delay in funding of up to six months. NECC's ETC designation did not become effective until December 21, 2001. And while the CPUC's Order was issued December 21, 2001, parties had twenty days (or until January 10, 2002) to file exceptions. Therefore, NECC was not eligible to file a certification by the October 1, 2001 or January 1, 2002 certification deadlines. Without a grant of the instant waiver request, NECC will be unable to obtain funding until third quarter 2002.

Although the FCC's rules provide a mechanism for certifications to be made on a quarterly basis on January 1, April 1, and July 1, certifications submitted on these dates will be deemed "untimely" and payment of universal service support will be delayed until one to two quarters after the certification is made.⁶ Upon inquiry, undersigned counsel has been advised that NECC's certification will effectively be treated as "untimely" and support will not begin accruing until third quarter 2002.

For the reasons set forth below, NECC respectfully requests a waiver to allow

5 47 C.F.R. §54.313(d)(3)(i), §54.314(d)(1).

6 For example, if the certification is submitted October 2nd, funding will not be received until the following April – nearly two quarters later. If the certification is submitted on December 31st, funding will not be received until the following April – one quarter later. ETCs have no control over when they receive designation and cannot, therefore, time such designation to coincide with the reporting schedule.

universal service support to commence accruing on February 6, 2002, the date that it filed its certification with the Commission.

II. Argument

Sections 54.313 and 54.314 are not explicit as to when a new competitive ETC is to begin accruing universal service funding. Before October 1, 2001, NECC had not yet been designated as a competitive ETC. Its ETC application was pending before the CPUC, and the CPUC did not pass on NECC's qualifications for ETC status until December 21, 2001. If the rule is read to mean that a certification must be filed before NECC is granted ETC status, then compliance is impossible, since ETC designation is a prerequisite to certification.⁷ NECC believes it has never been the FCC's intent to make compliance an impossibility.

The Commission's pronouncements appear to indicate that universal service payments to new ETCs properly accrue as of the date a certification is filed with the agency. In its Ninth Report and Order adopting certification rules for non-rural carriers, the FCC stated, "to ensure that non-rural carriers comply with Section 254(e), we do not believe that a non-rural carrier in a particular state should receive federal forward-looking support until the Commission receives an appropriate certification from the state."⁸ The Commission ultimately

⁷ The rule provides: "A rural incumbent local exchange carrier not subject to the jurisdiction of a state or an eligible telecommunications carrier not subject to the jurisdiction of a state serving lines in the service area of a rural incumbent local exchange carrier that desires to receive support pursuant to §§54.301, 54.305, and/or 54.307 and/or Part 36, Subpart F of this chapter shall file an annual certification with the Administrator and the Commission stating that all federal high-cost support provided to such carriers will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended." 47 C.F.R. §54.314(b) (emphasis added). In order to make a certification, the carrier must first be a designated eligible telecommunications carrier.

⁸ *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration*, 14 FCC Rcd 20432, 20484 (1999).

adopted the same rules for rural carriers in its Fourteenth Report and Order.⁹

In adopting the certification rule for rural carriers, Section 54.314, the FCC explained that “a state may file a supplemental certification for carriers that were not eligible for support at the time the state filed its initial certification.”¹⁰ Similarly, a carrier not subject to state jurisdiction should be permitted to file its self-certification as soon as it is designated as an ETC, regardless of whether that occurs after the October 1st filing deadline.

Taken together, NECC believes the above Commission statements evidence an intent to permit a state or a carrier, where a state does not exercise jurisdiction, to file a certificate when ETC designation is made and that funding should begin accruing as of the date the certification is filed.

Denial of funding to NECC until July 1, 2002 would be inequitable and unduly burdensome.¹¹ Pursuant to the CPUC’s December ETC Decision, NECC must make its universal service offering available to consumers immediately. It would be unfair to require NECC to assume the responsibilities required of an ETC to make services available to all customers requesting service without being provided the support needed to meet these responsibilities. Were the FCC to deny funding, NECC could be forced to seek leave of its ETC responsibilities, or deny customers prompt service until proper funding commences. Surely the Commission has never contemplated such a result.

⁹ *Federal-State Joint Board on Universal Service Multi Association Group Plan for Regulation of Interstate Services, Fourteenth Report and Order*, 23 CR 1338 (2001).

¹⁰ *Id.*, 23 CR 1338, at 1393.

¹¹ *See*, 47 C.F.R. §1.925(b)(3)(ii).

In fact, the FCC has taken just the opposite view when West Virginia inadvertently filed its certification after the appropriate deadline.¹² There, the Commission found good cause to continue funding in order to remedy, “the potential harm that would be suffered by customers of non-rural carriers in West Virginia, as a consequence of the West Virginia Commission’s failure to timely file its section 54.313 certification before the October 1, 2000 deadline.”¹³ In addition, the Commission reasoned, “We note that the potential harm caused by loss of one quarter of annual federal high-cost support is particularly egregious in a state such as West Virginia, which historically has service costs in excess of the national average.”¹⁴ The same considerations are applicable here. NECC is an ETC serving the public, it has a valid certification on file as of February 6, 2002, and it should be permitted to commence service as an ETC immediately with appropriate funding.

The underlying purpose of the rule will not served by delaying funding until July 2002.¹⁵ The certification rule is intended ensure that the Commission has received adequate assurances that universal service funds will be used for the purposes for which they are intended. NECC has submitted a certification which sufficiently demonstrates that the support will be used only for the “provision, maintenance and upgrading of facilities and services for

12 *West Virginia Public Service Commission Request for Waiver of State Certification Requirements for High-Cost Universal Service Support for Non-Rural Carriers, Order*, 16 FCC Rcd 5784 (March 13, 2001), “*West Virginia Order*”. Note that the waiver granted to the West Virginia Public Service Commission (PSC) was necessary because the PSC filed its annual certification after the October 1 deadline, not because a certification was filed after ETC designation was made as in the instant case.

13 *Id.*, 16 FCC Rcd 5784, at 5786.

14 *Id.*

15 *See*, 47 C.F.R. §1.925(b)(3)(i).

which the support is intended.”

The question of whether NECC should receive funds is resolved. NECC should not be penalized by an apparent quirk in the rules, which creates a certification deadline that is prior to an applicant’s designation as an ETC and therefore makes compliance impossible. The rule’s purpose was never to leave a new ETC without funding for any extended period during which it has ETC obligations. Such a result would undermine the Commission’s well-established competitively neutral universal service policies.

Grant of this request would serve the public interest.¹⁶ Consumers in high-cost areas of Colorado will be harmed if NECC is forced to delay implementation of its universal service offering. The universal service program is intended to promote access to advanced services in areas where telephone subscribership has been historically low. NECC’s universal service program furthers this goal by providing a competitive choice of universal service providers in high cost areas of Colorado. High cost support funding will enable NECC to promptly upgrade and construct new facilities to provide quality service to residents of Colorado.

III. REQUEST FOR EXPEDITED ACTION

Action on this waiver request must be expedited. NECC must negotiate with equipment vendors and other suppliers to roll out new services and meet demand in rural areas. It is extremely difficult, if not impossible, to properly prepare budgets, forecasts, and projected financial statements that such parties require in order to put in place the necessary equipment, funding and personnel needed to roll out service. Unless high cost support commences very soon, NECC will be forced to slow construction and planned system upgrades and may be

¹⁶ *Id.*

required to implement "held orders" for customers requesting service in remote areas, something the company has never done.

Delaying action on this request, even if the outcome is favorable, will harm both the company and the residents of Colorado, who are expecting NECC to commence providing Lifeline and Link-Up services immediately. Accordingly, NECC respectfully requests expedited action on this Petition.

IV. CONCLUSION

NECC requests that the Commission treat NECC's certification as a timely-filed annual certification and allow NECC to begin receiving universal service funding as of February 6, 2002. Put simply, NECC's ETC obligations have commenced. If action is delayed beyond March 22, 2002, the company will be forced to significantly alter its planned implementation schedule, including delaying planned equipment purchases.

Wherefore, for good cause shown, NECC respectfully submits that a waiver of the rules as set forth above will serve the public interest.

Respectfully submitted,

N.E. Colorado Cellular, Inc.

By: _____
David A. LaFuria
Allison M. Jones
Its Attorneys

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February 8, 2002

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February 6, 2002

VIA HAND DELIVERY

William F. Caton
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: N.E. Colorado Cellular, Inc.
§54.314 Annual Certification
CC Docket No. 96-45**

Dear Mr. Caton:

On behalf of N.E. Colorado Cellular, Inc. ("NECC"), we hereby submit this §54.314 Certification. A copy of the certification is being hand delivered simultaneously to Irene Flannery at the Universal Service Administrative Company ("USAC").

On December 21, 2001, the Colorado Public Utilities Commission granted Eligible Telecommunications Carrier ("ETC") status to NECC for the purpose of receiving federal universal service support. NECC is a wireless carrier and is submitting a self-certification pursuant to §54.314(b) of the Commission's rules.

Should you have any questions regarding this submission, please contact the undersigned.

Sincerely,

David A. LaFuria
Allison M. Jones
Counsel for N.E. Colorado Cellular, Inc.

Enclosure
cc: Irene Flannery

FEB 06 2002

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CELLULARONE®

of Northeast Colorado

VIA FACSIMILE AND FEDERAL EXPRESS

Ms. Pamela Fischhaber
The Colorado Public Utilities Commission
1580 Logan Street, Office Level 2
Denver, CO 80203

January 23, 2002

VIA FACSIMILE AND FEDERAL EXPRESS

Mr. Thomas Webb
Universal Service Administrative Company
80 South Jefferson Road
Whippany, NJ 07981

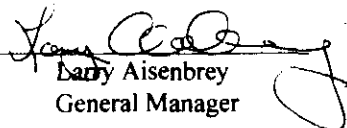
Re: N.E. Colorado Cellular, Inc., Certification for High Cost Loop Support

Dear Ms. Fischhaber and Mr. Webb:

I am the General Manager of N.E. Colorado Cellular, Inc. ("NECC"). This certification is submitted on behalf of NECC in accordance with FCC Rule Sections 54.313 and 54.314. On behalf of NECC, I hereby certify under penalty of perjury that all high-cost support provided to the Company will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended, pursuant to Section 254(e) of the Telecommunications Act of 1996.

N.E. Colorado Cellular, Inc.

By


Larry Aisenbrey
General Manager

01-24-02

Date

2002 JAN 31 PM 3:25

FEB 06 2002

CERTIFICATE OF SERVICE

I, Janelle Wood, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 8th day of February, 2002, sent via hand delivery a copy of the foregoing Petition for Waiver filed today to the following:

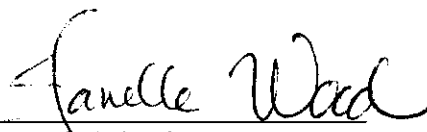
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